IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Writ Petition No. 1304 of 2004

1. Sky Anchorage Co-operative
Housing Society Ltd., a Society duly
registered under the provisions of
the Maharashtra Co-operative Societies
Act, under Regn. No. BOM/MKW/HSG/TC/10884,
having it's office at C.T.S. No. 1200/7,
Panch Marg, Versova, Andheri (West),
Mumbai - 400 061.

2. Shri Pradeep J. Rathi,
of Mumbai, Indian Inhabitant, the
Secretary of Sky Anchorage Co-operative
Housing Society Limited, C.T.S. No. 1200/7,
Panch Marg, Versova, Andheri (West),
Mumbai - 400 061. .. Petitioner.

V/s.

1. The Municipal Corporation
of Greater Mumbai, a body Corporate
Having its offices at Mahapalika Marg,
Fort, Mumbai - 400 001.

2. The Municipal Commissioner,
Mumbai Municipal Corporation,
Municipal Head Office, Mahapalika Marg,
Fort, Mumbai - 400 001.

3. The Dy. Municipal Commissioner,
(Zone-III), Municipal Bldg. 'K' West,
Ward, S.V. Road, Andheri (West),
Mumbai - 400 058.

4. The Asst. Municipal Commissioner,
('K' West Ward), Municipal Bldg.
'K' West Ward, S.V. Road,
Andheri (West), Mumbai - 400 058.

5. Mr. Prashant Yadhav & Mr. Shaikh
Badri Alam, Both of Mumbai, Indian
Inhabitants, Residing at A-001,
Arshie Complex, Panch Marg,
Versova, Andheri (West), Mumbai - 400 061.

6. Mr. Sosa Thomas & Mrs. Neena Thomas,
Both of Mumbai, Indian Inhabitants,
Residing at A-002, Arshie Complex,
Panch Marg, Versova, Andheri (West),
Mumbai - 400 061.

7. Dr. Indrakumar Brijlal Jain,
Mr. Brijlal Jain, &
Mrs. Champadevi Brijlal Jain,
Both of Mumbai, Indian Inhabitants,
Residing at A-003, Arshie Complex,

Panch Marg, Versova, Andheri (West),
Mumbai - 400 061.

8. Mr. Vipul Tanna,
of Mumbai, Indian Inhabitant,
Residing at A-004, Arshie Complex,
Panch Marg, Versova, Andheri (West),
Mumbai - 400 061.

9. Mr. Raghuvirsingh G. Sandhu,
of Mumbai, Indian Inhabitant,
Residing at B-001, Arshie Complex,
Panch Marg, Versova, Andheri (West),
Mumbai - 400 061.

10. Mrs. Mohinder Kaur G. Sandhu &
Mr. Raghuvirsingh G. Sandhu,
Both of Mumbai, Indian Inhabitants,
Residing at B-002, Arshie Complex,
Panch Marg, Versova, Andheri (West),
Mumbai - 400 061.

11. Mast. Ramkumar Santoshi (Minor),
Through Rajkumar Santoshi, the father
and Natural Guardian, of Mumbai,
Indian Inhabitant, Residing at B-003,
Arshie Complex, Panch Marg,
Versova, Andheri (West),
Mumbai - 400 061.

12. Mr. Rajkumar Santoshi,
of Mumbai, Indian Inhabitant,
Residing at B-004, Arshie Complex,
Panch Marg, Versova, Andheri (West),
Mumbai - 400 061. .. Respondents

Mr. Raju Morye i/b. M/s. Kumana & Co. for the Petitioner.
Ms. A.K. Savla for the Respondent Nos. 1 to 4.
Mr. D.J. Khambatta with Mr. H.N. Thakore i/b. M/s. Thakore Jariwala & Associates for the Respondent Nos. 5 to 12.

CORAM : F.I. REBELLO &
S.R. SATHE, JJ.
DATED : 23.07.2004

JUDGMENT :-

1. Rule. By consent heard forthwith in view of the question of law involved and the reply filed on behalf of Respondent Nos. 1 to 4. Petitioners is a Society, registered under the provisions of Maharashtra

Co-operative Societies Act. Petitioner No. 2, is the Secretary of Petitioner No. 1. According to the

Petitioners's Building Nos. A to G were constructed by M/s. Oscar Builder (hereinafter referred to as the Builder/Promoter) under the provisions of the Maharashtra Ownership of Flat Act (MOFA). Building A to B in terms of the agreement for sale of flats were constructed on plot bearing CTS No. 1200/2/1, 1200/2/2 and 1200/2/5. Building Nos. C to G were built on plot bearing CTS No. 1200/7 in terms of the agreement. At the time of the sale of the flats in building A to G, separate plans were sanctioned by Respondent No. 1. It is the case of the Petitioners that in or around February, 1994, the Builder/Promoter fraudulently and in collusion with officers of Respondent No. 1 obtained an amalgamation of plots bearing CTS No. 1200/2/1, 1200/2/2, 1200/2/3, 1200/2/4 and 1200/2/5 with plot bearing CTS No. 1200/7, pursuant to sanctioned plan No. CE/1435/BS II/LOKWN dated 28th February, 1994. It is the case of the Petitioner that, however, till date, the plots have not been amalgamated in the land records and revenue records. The members of Petitioner No. 1 Society are residing in building C to G built on plot bearing CTS No. 1200/7. Respondent Nos. 5 to 12 are members of separate Society, known as "Arshie Complex Co-operative Housing Society Ltd." comprising of Buildings A and B. It is then set out that plots

bearing CTS No. 1200/2/3 and 1200/2/4 are owned by one Mr. Manek Shah. According to the Petitioners, as per the sanctioned plan of Building A and the sanction plan

of building B an open space around buildings A and B located on plot bearing CTS No. 1200/2/1 and CTS No. 1200/7 are sanctioned as car parking space. Respondent Nos. 5 to 12 in breach and total violation of the sanctioned plan, have encroached upon the said space, abutting their respective row houses in buildings A and B by building an otla and a wall around the said open space, thereby, converting them into private and exclusive enclosed space and have termed them as gardens abutting their respective row houses. It is the case of the Petitioners that this is ex-facie in contravention of the sanctioned plan, as the open space around buildings A and B have been sanctioned as joint open space. Consequent thereto, the open space meant for parking of car for members of buildings A and B was totally blocked and consequent thereto, the members of the said co-operative society have encroached upon the open car parking space allotted in the plan for the flat purchased by the members of Petitioner No. 1. The Petitioners by the letter of 2.9.1999, drew the attention of the Respondent No. 1 to the said encroachment by Respondent Nos. 5 to 12 and called upon the said Respondents to take appropriate action. Officers of 1st Respondent had visited the site, made

inspection and informed the Respondent Nos. 5 to 12 that the encroachments were unauthorised and were liable to be demolished.

(5)

Respondent Nos. 5 to 12 thereafter in or around October, 1999, filed a Suit in the City Civil Court being Suit No. 6216 of 1999, seeking an order/injunction against Respondent No. 1 restraining the Respondent No. 1 it's Officers, Agents and Servants from demolishing these structures. Respondent Nos. 5 to 12 also prayed for regularising the said encroachments and construction termed as 'Row House Gardens with Otla'. The interim relief sought for was rejected by order dated 12.10.1999 and according to the Petitioners, the learned Judge clearly observed that 'there is no plan showing the existence of gardens'.

As per the sanctioned plan, there are parking spaces, marked as 29 to 56 on the plot bearing CTS No. 1200/2/1 and the internal access road of the plot bearing CTS No. 1200/7 is kept open as internal access road for buildings C to G. The Respondent Nos. 5 to 12 have converted the open car parking spaces into gardens abutting the said buildings A and B and the flat purchasers of buildings A and B are now parking their cars on the internal access road buildings C to G. It is further submitted that all the open car parking

spaces occupied by members of Arshie Complex Co-operative Housing Society Ltd., on plot bearing CTS No. 1200/7 are self allotted by the said Society and they are illegally parking their cars in the said open spaces/internal access road for buildings C to G.

2. Reference is then made to Regulation framed by the Respondent No. 1 known as Development Control Regulations for Greater Bombay, 1991 and more specifically Regulation 28(b), as also Regulation 29(e). Under Regulation 43(1), it is pointed out that the for multi-storeyed high-rise buildings the additional provisions relating to fire protection contained in Appendix VIII shall also apply. The approach to this building and open space on all sides upto 6 Mtrs. width and their layout shall conform to the requirements of the Chief Fire Officer. These open spaces shall be free from any obstruction and shall be motorable. It is submitted that the Respondent Nos. 5 to 12 have encroached upon the mandatory open space by constructing otla and a wall enclosing the mandatory open space.

It is the case of the Petitioners that from 1999 onwards, they have been representing to Respondent No. 1 and it’s officers by addressing various letters. The Petitioners state that their persistent efforts bore fruit when ultimately Respondent No. 4 issued notice under section 53(1) of the Maharashtra Regional & Town

Planning Act, 1966 upon Respondent Nos. 5 to 12 dated 13.12.2003 and called upon Respondent Nos. 5 to 12 to demolish the unauthorised enclosure of the open space by constructing otla and enclosing it with a wall. Respondent Nos. 1 to 4 did not take any further action, pursuant to the notice dated 13.12.2003. Legal notices

were caused to be served vide letter dated 12.3.2004 addressed to Respondent No. 4, recording the fact that no action had been taken and to forthwith take action. The Petitioners contend that they thereafter learnt reliably that Respondent Nos. 5 to 12 made representations after the receipt of Notices under section 53(1) of the Maharashtra Regional & Town Planning Act and based upon the said representations, the Respondent No. 4 had issued directions for withdrawal of the Notices dated 13.12.2003. It is the case of the Petitioners that on coming to know of the said facts, they sent Notice dated 17.3.2004 addressed to Respondent No. 2 and 4 calling upon to withdraw the directions issued for withdrawal of the notice issued under Section 53(1) of the Maharashtra Regional & Town Planning Act and to fix up a personal hearing and thereafter pass a reasoned order. The Petitioner No. 1 on 19.3.2004 also applied to Respondent No. 1 under the ‘Maharashtra Right to Information Ordinance 2002’ for obtaining the copies of all the submissions made by the Respondent Nos. 5 to 12 as well as copies of the orders

passed by Respondent No. 2. They have been furnished with some of the documents set out in paragraph 16 of the Petition. Aggrieved by the action, the present Petition.

3. Respondent Nos. 6,8,9 & 11 and the purchaser from Respondent No. 5 have filed affidavits opposing the

Admission of the Petition and granting of the reliefs. By and large contention raised are same or similar. Vipul Tanna, Respondent No. 8 has filed affidavit-in-reply and raised various preliminary objections, amongst them contending that the builder has challenged the registration of Petitioner Society and Writ Petition to that effect is pending before this Court. That really would be of no consequence as admittedly, Petitioner No. 2, the Secretary is residing in one of the building. The other preliminary objections need not be dealt with as the issue would be whether it was open to Respondent Nos. 5 to 12 to permit enclosing of open space, which forms part of the development plan. It is then averred that on notice dated 13.12.2003 issued under section 53(1) of the Maharashtra Regional & Town Planning Act being received by the Respondents, they had informed the Respondent No. 3 that they had acquired the flats on 14.6.1997 from Oscar builders and perusal of their agreement would show that otla with garden was sold to the Respondents by the

builders. The agreement also states that the structure is an authorised structure and the garden forms part of the 15% for garden and recreational area open space as per DC Regulations. The construction had been approved by Arshie Complex Co-operative Society, which is the beneficial owner of the entire plot and all the Respondents are members. It is then pointed out that in each and every agreement for sale, the bungalow/flat

alongwith attached garden open to sky and parking space was allotted to each bungalow owner. The garden contains palm trees and other plants provided by the builder. It is set out that the disputes of Petitioner No. 2 and the other Petitioners cannot be used for initiating the present proceedings. It is then pointed out that since, 1992/1995 upto 1996, when the last building was completed all the 87 members of buildings A to G in the complex were fully aware that the entire complex has a composite infrastructure and all members have equal rights of all common facilities and amenities. It is also pointed out that some of the members of the Petitioners are parking cars in building A and B wings. It is denied that there is any contravention of Section 28(b), 29(e) and 43(1) of the DC Regulations It is not necessary to advert to the other averments.

4. Ravindra Shankar Sanas, Junior Engineer (Buildings)

has filed an affidavit on behalf of the Respondent Nos. 1 to 4. Various preliminary objections have been raised, which clearly are devoid of merit and really ought not to be raised by a public body, which is bound to comply with the provisions of the Act, Rules, Regulations and Bye-laws. It is then pointed out that Petitioner No. 2 had made a complaint to the Deputy Municipal Commissioner (Zone -III) for demolition of illegal construction of garden and encroachment on open

space and for taking necessary action as per D.C. Rules. On receiving the said complaint, the site was inspected and report was submitted to the Assistant Commissioner, K/West Ward. A notice under section 53(1) of the MR&TP Act was issued to the owners of the said structures, who on receipt of the notice sent a reply dated 3.1.2004 to the Assistant Commissioner, K/West Ward, West and on their own sent a reply dated 20.1.2004 to the Municipal Commissioner, contending that all 8 bungalow owners have small gardens in front of their house in the compound, which was given by the builder and a clause to that effect is incorporated in each and every agreement and that there is no structural change, hindrance or encroachment whatsoever and owners of the said bungalow contended that the matter be considered sympathetically and drastic action of demolition should not be taken. A report was put up by Deputy Municipal Commissioner (Zone-III) stating that Arshie Complex

Co-operative Housing Society is divided between A and B buildings on one side and C, D, E, F and G on the other side and that A and B building have 50 members and C, D, E, F and G have 35 members. The Petitioners Society had complained to the D.M.C. (Z-III) and demanded demolition of the illegal compound wall constructed for bifurcation of garden from the compulsory open space. There is Note of the Executive Engineer, which clearly states that space between building and compound wall are approved as open space only and the otlas constructed in

front of buildings A and B are not approved by Building Proposal Department. The said otlas and the compound wall constructed in the complex adjoining the ground floor exit appears to be for the protection and for the preventing the misuse of lawn by other persons. Since the garden enclosed is open to the sky there is no violation of FSI excluding the covering of premises for personal use. Premises were sold by the developer alongwith open space. Deputy Municipal Commissioner (Zone-III) put up note for further orders to the Commissioner and the Commissioner after going through the note and file papers allowed the compound wall as a tolerated structure. It is denied that the impugned decisions have been issued in contravention of letter dated 7.2.2004 and the decision taken have been taken in contravention and breach of plans. The decision by the Municipal Commissioner was taken after examining the

records and taking into consideration the facts and circumstances peculiar to the case and the same is a bonafide decision. It is therefore, set out that the Petition should be dismissed.

5. At the hearing of the Petition, on behalf of the Petitioner's their learned counsel contended that considering the regulation adverted to and referred to, it was not open to the Municipal Commissioner to regularise the said construction and or to treat them as authorised structures. The open space are meant for the

benefit of all the owners of the building and cannot be permitted or used by any single person.

6. On behalf of the Respondent Nos. 1 to 4, their learned counsel contended that it was open to the Municipal Commissioner, considering the Regulation 64 to regularise the structure and consequently it is set out that this Court should not interfere with the said decision. On behalf of the Respondent Nos. 5 to 12, their learned counsel contended that the action of the Petitioner is not bonafide. The Respondent Nos. 5 to 12 were sold the premises alongwith the open space by the builder and they have not put up any construction on the same except for protecting that part of the place, which was sold to them and consequently, this Court should not interfere with the decision taken by the

Respondent No. 1.

7. After hearing the learned counsel for the parties, the following question are required to be answered :-

(1) Is it open to the builder or for that matter for the purchaser of the flat in a building, which form part of the development plan to appropriate any part of a place reserved as open space under the Development Control Regulation?

(2) Is the power conferred under regulation 64 on the Commissioner includes the power to regularise construction on open space or use of an open space by only one person to the exclusion of the other members?

Considering the above, it would be necessary to refer to some of the Regulations, which would be relevant for the purpose of deciding the controversy. Regulation 23 provides the extent of open space in any layout of vacant land in residential and commercial zone, which have to be kept. We then come to the relevant regulation, which we are concerned with, namely, regulation 28 (a) and (b), which reads as under:-

(a) Building abutting more than one street - When a building abuts two or more streets, the set-backs from each of them shall be such as if the building were fronting each such street.

(b) Open spaces separate for each building or wing - The open spaces required under these Regulations shall be separate or distinct for each building and where a building has two or more wings, each wing shall have separate or distinct open spaces as required under these Regulations;

The next relevant regulation, is regulation 29 (e), which reads as under :-

(e) Tower-like structures - Notwithstanding any provision to the contrary, a tower-like structure may be permitted only with 6 m. open space at the ground level and one-set back at the upper levels provided that the total height does not exceed 24 m. If it exceed 24 m. but does not exceed 37.5 m. the minimum open space at ground level shall be 9 m.

Beyond 37.5 m. the minimum open space at ground level shall be 12 m. with two set-backs at upper levels. The terrace created by the set-back shall be accessible through a common passage and/or common staircase only.

Regulation 29(10) reads as under :-

Every open space whether interior or exterior shall be kept free from any erection thereon and shall remain open to the sky except the feature covered by the next Regulations.

It is not the case of the Respondents that their case falls under Regulation 30. Their case is that they applied to Respondent No. 2, who has exercised his powers. The question is whether as Regulation now stands, it was open to the Respondent No. 2 to pass an order that has been passed.

8. The need for open space has been recognised by the Apex Court as part of the planning process in Medical

Trust v. B.S. Muddappa (1991) 4 SCC 54. The Apex Court in the judgment noted that the protection of the environment open spaces for recreation and fresh air, play-grounds for children, promenade for the residents and, other convenience or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It further observed that the public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed. The reservation of the open spaces for parks and playgrounds is universally recognised as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill effects of urbanisation.

A Division Bench of this Court in Down Mangor Residents Valley, Residents' Welfare Association and another Vs. Mormugao Municipal Council, Goa and others AIR 2002 Bombay 258, to which one of us was a party (F.I. Rebello, J.) in the matter of compulsory open space. Considering the law summed up, the position in paragraph 15, which may be gainfully reproduced as under :-

> 15. From the above, the following conclusions emerge:-
>
> (i) Open spaces maintained as part of a development project or pursuant to a building licence, have to be kept open as per the development permission or building licence as a condition for development or construction in terms of the relevant Act, Rules and Bye-laws or other executive directions;
>
> (ii) These open spaces as referred to in conclusion

(i) cannot be altered, converted or changed without hearing the beneficiaries or the parties for whose benefit they were maintained and that too only if there is specific provision under any enactment having the force of law, including Bye-laws;

(iii) Those who have put up constructions or changed user on such open spaces as referred to in conclusion (i), can have no equitable consideration in their favour on the ground that the constructions are existing for a long time, whether the constructions are legal or illegal, as the open spaces have been kept for the benefit of the beneficiaries at the time the development permission or building licence was granted, in furtherance of their right to life. This consideration outweighs all other considerations.

(iv) The authorities who grant the development permission/licence and who have been conferred powers by any enactment, including Rules, Regulations, Bye-laws, etc. and who fail to discharge their duties by acting according to law on complaints being made of illegal constructions, or on change of user or the like, have to expeditiously take action in the matter, as otherwise in terms of law declared by the Apex Court, they are liable for action, including disciplinary action;

.....

On consideration of the above conclusions therefore what is clear is that open space are meant for the benefit of all persons, who are entitled to the benefit under the development plan and no single individual can appropriate any part of the same, If the requirement is that open spaces have to be kept in terms of the Act, Rules and Regulations, they have to be so kept. Once they form part of the development plan, which has been approved, they can not be altered unless the Act, Rules or Regulation so provide. In other words, an open space, is always open, to be kept as open space to be used for the purpose, for which it is kept.

In the instant case, here considering the

Regulations, the open space had to be kept. The Regulation clearly provides that it can not be put to any other use except which are permissible under Regulation 30. The Respondents Nos. 5 to 12 can not contend that the case falls within Regulation 30. Respondent No. 2 it has been contended exercised power in terms of Regulation 64. It would be therefore, have to be held that the action of the Respondent Nos. 5 to 12 in putting up the construction in the open space and the inaction of the Respondent Nos. 5 to 12 to deal with the action are contrary to the provisions of the Town Planning Act and the Development Control Regulation, unless Respondent No. 2 had powers under Regulation 64.

9. With that, we come to the contention, whether it was open under Regulation 64 to the 2nd Respondent to treat

the construction as tolerated construction. Regulation 64 may be reproduced, which reads as under :-

> 64. Discretionary powers -(a) In conformity with the intent and spirit of these Regulations, the Commissioner may:-
>
> (i) decide on matters where it is alleged that there is an error in any order, requirement, decision, determination made by any municipal officer under delegation of powers in Regulation or interpretation in the application of these Regulations;
>
> (ii) interpret the provisions of these Regulations where a street layout actually on the ground varies from the street layout shown on the development plan;
>
> (iii) modify the limit of a zone where the boundary line of the zone divides a plot with the previous

approval of Government; and

(iv) authorise the erection of a building or the use of premises for a public service undertaking for public utility purposes only, where he finds such an authorisation to be reasonably necessary for the public convenience and welfare, even if it is not permitted in any land use classification.

A learned Division Bench of this Court in Writ Petition No. 379 of 2003 decided on 5.5.2004 in Mr. Rajendra Thackar vs. Municipal Corporation of Greater Bombay and Anr. had occasion to consider Regulation 64 while considering Regulation 64(b), the learned Division Bench noted that besides what can be modified/relaxed under Section 64(b) are only "dimensions prescribed by these Regulations". By the term dimension what is meant is length, breadth, height, area and volume. Proceeding further, the learned Division Bench noted that on the consideration of the provisions of the Maharashtra Regional & Town

Planning Act, in the matter of exercise of their powers observed as under :-

"Since section 46 enjoins upon him the duty to have due regard to the provisions of a plan, it would also not be permissible to him to regularise any structure which would be in violation of any provision of the Development Control Regulations for Greater Mumbai, 1991 as existing on the date when he passes an order of regularisation."

Even otherwise, on perusal of regulation 64 it is clear that if Regulation 64(a) will not at all come into play in the instant case. At the highest, the

exercise to treat the construction as tolerated structure can not fall under Regulation 64(b). A look at the said Regulation would indicate that normally this power can be exercised before permission is granted. For example on reconstruction it may not be possible to maintain the dimension. In such a circumstance, it may be open to the Commissioner to exercise his discretion. Similarly, there may be a plot which can not be built upon for a minor requirement contemplated by Regulation 64(b). These and other could be instances when the power under Regulation 64(b) could be exercised provided they are minor variations. The power under Regulation 64(b) at any rate can not be exercised in case of development plan, which was sanctioned and building constructed in terms of the development plan. If an argument can be countenanced that development plan can also be given a go-bye, that would tantamount saying that there is no

requirement for any permission for development as it is open to the Commissioner to exercise provisions under Regulation 64(b) at his whims and fancies. In our opinion, this could never be so. That power could be before the development plan is approved or even in the course of development if in the meantime, there has been change of regulation and requirement of altering the dimensions. The power under Regulation 64 in the instant case of regularising construction in open space

contrary to Regulation 29 (10) could never be resorted or exercised by Respondent No. 2 and by the other Respondents. The action, therefore, is totally arbitrary and without jurisdiction and consequently, is liable to be set aside.

10. In the case of M.C. Mehta Vs. Union of India (2004) 17 ILD 610 (SC) in the matter of regularisation, the Apex Court noted that regularisation can not be done if it results in violation of right of life enshrined in Article 21 of the Constitution. In the instant case, the right to open space is a part of the requirement of the right to life. Once that be the case and open spaces form a part of right to life, Respondent No. 2 could not have regularised the said open space. It is not necessary to advert to other judgments. Suffice it to say, that Respondent No. 2 or the other Respondents in exercising statutory

functions, could not have regularised the said construction.

In the light of that, Rule made absolute in terms of prayer clause (a) and (b). We, further direct Respondent Nos. 1 to 4 after giving opportunity to the Petitioner and Respondent Nos. 5 to 12 and considering the judgment of this Court to pass appropriate order

according to law within 16 weeks from today.

(F.I. REBELLO, J.)

(S.R. SATHE, J.)